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CHARLES ELMORE CROPLEY

United States Supreme Court

October Term, 1930.

No. 116.

THE UNITED STATES,
Petitioner,

vs.

FELT & TARRANT MANUFACTURING COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR RESPONDENT.

THOMAS G. HAIGHT,
ROBERT H. MONTGOMERY,
J. MARVIN HAYNES,
Counsel for Respondent.

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BRIEF FOR RESPONDENT.

Statement of the Case.

Very little need be added to the statement of the case as set forth in petitioner's brief. It is conceded that respondent overpaid its 1917 income taxes to the extent of $26,909.50. Repayment is resisted upon the sole ground that the claim for refund is insufficient in that it fails to set forth the specific facts and ground upon which this suit is based. As will be seen from that portion of the claim which is quoted in petitioner's brief, it is general rather than specific. It states that it is filed "to protect *all possible* legal rights of the taxpayer, *pending*, and at the date of the settlement of the claim for relief."[1] The Commis-

[1] In petitioner's brief, the word "date" appears in parentheses and immediately follows the word "rate". The use of the latter word in the record at p. 10 is clearly a misprint. The wording of the claim is correctly quoted in the opinion of Chief Justice BOOTH at p. 14 of the record.

sioner of Internal Revenue interposed no objection to the form of the claim for refund,[2] but acted upon it and allowed it to the extent of approximately $17,000.[3] The failure of the claim for refund to set forth the specific facts on which the admitted overpayment is based, in no way misled the Commissioner or prevented him from passing upon the claim,[4] because, at the time the claim was filed and indeed until after the expiration of the time within which an amended claim for refund could have been filed, it was the settled policy of the Commissioner not to allow such deductions as respondent sought, the failure to allow which resulted in the overpayment. As the facts were stipulated, any insufficiency of the claim for refund has in no way hindered the petitioner in preparing for trial.

SUMMARY OF ARGUMENT.

I.

This suit is resisted on a mere technicality, the failure to comply with which in no way interfered with the Commissioner in the discharge of his duties, or thwarted the purpose of the statute and regulations relied upon by the petitioner. Hence, every doubt should be resolved in favor of the respondent.

II.

As the Commissioner did not object to the sufficiency of the claim for refund until after the time for filing an amended claim had expired, but actually made a refund thereunder, he should be held to have waived any insufficiency thereof under the regulations, especially in view of the preceding point.

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[2] R. p. 18.
[3] R. p. 12.
[4] R. p. 16.

ARGUMENT.

I.

THIS SUIT IS RESISTED ON A MERE TECHNICALITY, THE FAILURE TO COMPLY WITH WHICH IN NO WAY INTERFERED WITH THE COMMISSIONER IN THE DISCHARGE OF HIS DUTIES, OR THWARTED THE PURPOSE OF THE STATUTE AND REGULATIONS RELIED UPON BY THE PETITIONER. HENCE, EVERY DOUBT SHOULD BE RESOLVED IN FAVOR OF THE RESPONDENT.

The Government resists the payment of an admittedly just obligation upon the barest technicality, when a compliance with the technicality (the making of the claim for refund more specific), within the time limited by law, would not have changed the petitioner's position and, to that extent, would have been, as the Court of Claims said, "a useless and futile act". Respondent's claim is based upon the failure to allow a deduction from gross income for the year 1917 for exhaustion of certain patents. This deduction was not claimed in the original return. As pointed out in the opinion of the Court of Claims, and as admitted in petitioner's brief, it was the settled rule and policy of the Commissioner of Internal Revenue, at the time the claim for refund in the case at bar was filed, to refuse deductions from gross income on account of depreciation of patents, unless the deduction was specifically claimed in the original return for the year involved. This policy continued until the month of May, 1925, when the Commissioner acquiesced [5] in a decision of the Board of Tax Appeals which had been made in the January preceding,[6] to the effect that a taxpayer was entitled to an allowance for depreciation of patents, notwithstanding that no claim for deduction had been made in the original return. However, the respon-

[5] Internal Revenue Bulletin IV-25-19 p. 1.
[6] *Appeal of Union Metal Mfg. Co.*, 1 B. T. A. 395.

dent's time within which to file an amended claim for refund expired on April 1, 1925.[7]

Therefore, at the time the Commissioner changed his policy or rule, respondent could not have filed an amended claim.

This Court, in *Tucker* v. *Alexander*, 275 U. S. 228, stated that the statute requiring the filing of a claim for refund as a condition precedent to the institution of a suit to recover a tax illegally collected, and the regulations promulgated by virtue thereof, "are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial". Consequently, the purpose of the statute and regulations would not have been served or furthered in any way had the claim been made technically accurate.

II.

AS THE COMMISSIONER DID NOT OBJECT TO THE SUFFICIENCY OF THE CLAIM FOR REFUND UNTIL AFTER THE TIME FOR FILING AN AMENDED CLAIM HAD EXPIRED, BUT ACTUALLY MADE A REFUND THEREUNDER, HE SHOULD BE HELD TO HAVE WAIVED ANY INSUFFICIENCY THEREOF UNDER THE REGULATIONS, ESPECIALLY IN VIEW OF THE PRECEDING POINT.

The statute itself does not state what the claim for refund shall contain, but simply provides that a claim must be filed with the Commissioner "according * * * to the regulations of the Secretary of the Treasury".[8] The regulations in force when the claim in question was filed provided that the claim should be on a certain form and that, "All the facts

[7] The respondent, on February 2, 1923, filed a written waiver of its right to have the taxes for the year 1917 determined and assessed within five years after the return was filed (R. p. 11) and consequently, by virtue of Section 281 (e) of the Act of 1924, it was entitled to file a claim for refund on or before April 1, 1925.

[8] Sec. 1318 of the Revenue Act of 1921 amending Sec. 3226 of the Revised Statutes quoted in full on p. 15 of petitioner's brief.

relied upon in support of the claim should be clearly set forth under oath.'"[9] It will be noticed that the word "should" is used instead of the word "shall", which would seem to indicate that the Treasury Department considered it *preferable* that all the facts should be set forth rather than they *must necessarily* be set forth. The pertinent part of the claim for refund in this case is as follows:

> "The taxpayer has filed with the commissioner a claim for special relief under section 210 of the 1917 revenue act for the excess-profits tax assessed for this period.
>
> This claim is filed to protect *all possible legal rights* of the taxpayer, *pending*, and *at the date of*; the settlement of the claim for relief."

The claim was not intended to cover only such refunds as the respondent might be entitled to in the event that its claim for special relief should be granted, as petitioner's brief contends. This is manifest, we submit, from the language of the claim. It states that it is filed "to protect *all possible* legal rights of the taxpayer, *pending*, and at the date of, the settlement of the claim for relief." If it had been intended to limit the claim only to the rights which might arise in the event that plaintiff's claim for special relief should be granted, the conjunctive "and" would have been omitted, and the claim would have read that it was "to protect all legal rights pending at the date of the settlement of the claim for relief." The claim by its language sought to cover two different kinds of rights,—those which *were pending* at the time of the filing of the claim and also those which *might* exist in the event that the claim for special relief was granted. The latter kind, of course, could not arise until after the Commissioner had determined whether or not he would grant special relief. As was said in the opinion

[9] Art. 1036, Regulations 62, quoted on pp. 16-17 of petitioner's brief.

of the Court of Claims,[10] "By the use of such comprehensive terms it is to say the least perfectly apparent that the taxpayer notified the commissioner that all its legal rights would be insisted upon." The Commissioner could doubtless have objected to the claim because of its generality. He did not do so but, on the contrary, acted upon it and a year later actually refunded to the respondent $17,050.55.

This Court has decided in *Tucker* v. *Alexander, supra,* that the Commissioner of Internal Revenue may waive any insufficiency, under the regulations, of a claim for refund. In that case, the plaintiff specified, not only in his claim for refund, but in the complaint which he filed in court, certain grounds upon which he based his contention that he had paid more taxes than he should have paid, and it was not *until the trial* that he shifted his position and sought to recover on an *entirely different* ground, and presumably, an amount of money different than he would have been entitled to on the other grounds. If a waiver of the requirement of the regulations that "all the facts relied upon in support of the claim should be clearly set forth" * may be made *during the trial* and by a course of conduct there—it must necessarily follow that a waiver can be made *before suit is brought* and can be found to have been made by a course of conduct inconsistent with an intention to insist upon a compliance with the regulations. No reason can be conceived why the validity of the exercise of the right to waive should be depended upon *when it is exercised, i. e., whether at the trial of an action or before a suit is brought.* This is more readily apparent when it is considered that the purpose of the statute and regulations, as stated in *Tucker* v. *Alexander,* was "for the convenience of govern-

[10] R. p. 17.
* Rec. 62, Art. 1036.

ment officials in passing upon claims for refund and preparing for trial."

In the case at bar, it is our contention that the Commissioner, in (a) acting on the claim and making a refund thereunder, and (b) failing to interpose any objections to the fact that it was insufficient under the regulations, should be held to have waived his right to insist, after the time for filing a new claim has expired, that the claim should be more specific; especially in view of the before stated nonmandatory language of the regulations; and that any doubts on this point should be resolved in favor of the respondent, because of the extremely technical character of the sole defense to this suit.

It will be borne in mind that the respondent is not seeking to recover on a ground different from that or those specified in the claim for refund, but is seeking to recover on a claim which was stated to be filed to protect "*all possible legal* rights of the taxpayer" *then pending* as well as those which might exist at the date of the settlement of its claim for special relief. The only objection to the claim that there can be, is that it does not set forth "all the facts relied upon in support of the claim". In other words, that it is general rather than specific. It did not set forth *any* of the facts relied upon", either in respect to the claim for special relief or otherwise. But the fact that it was general and not specific was never objected to. If the generality of the claim was insufficient to enable the government officials to pass upon the claim, it was surely the duty of the Commissioner, instead of acting upon it, to ask for any further details that he might desire, or to require the respondent to make it as specific as possible.

Surely the failure of the Commissioner to object to the claim, coupled with his action in making a refund there-

under, was inconsistent with any intention to insist that it should be more specific; it was calculated, on the contrary, to induce a belief that there was an intention or purpose to waive any such requirement. Especially is this so, in view of the apparently directory rather than mandatory language of the regulation above referred to.

Several of the lower Courts have dealt with the question of waiver of the insufficiency of claims for refund. We will briefly analyze their decisions.

In *Union Trust Co.* v. *McCaughn*, 24 Fed. (2d) 459 (D. C. E. D. Pa.), the claim for refund did not include the claim made at the trial. It appeared, however, from the notice of the rejection of the claim, that that point had been considered by the Commissioner and rejected by him. Judge KIRKPATRICK, after pointing out that the object of the statute in requiring a claim for refund was to afford the Commissioner "an opportunity to correct errors made by his office and to spare the parties and the courts the burden of litigation in respect thereto", said (p. 461):

> "If these objects have been attained, the statute has been sufficiently complied with, even though some of the grounds upon which the claim was made were not specifically set forth in the application. It is apparent from the letter of the Commissioner that he had before him the question now raised, and that he had full opportunity to reconsider and modify the ruling of his office, had he deemed the ruling erroneous. He also, of course, had the right to waive any defect or informality in the application for refund, and, in view of his letter, he will be held to have done so."

As before pointed out, the failure of the claim for refund in the case at bar to specifically set forth the ground upon

which this suit is based in no way affected the purposes sought to be accomplished by the statute.

In *Howbert* v. *Penrose*, 38 Fed. (2) 577, (C. C. A.—10th), the trial court had found for the defendant upon the ground that the claim for refund set forth no facts in connection with the loss growing out of the sale of certain stock, although it did set forth the facts in respect to losses on sales of other stocks. The *amount* specified in the claim for refund, which was quite general, included this loss and it was claimed in the income tax return, although not identified by name. Moreover, neither in an appeal to the Commissioner for relief against a proposed assessment, nor in a petition for rehearing, was this particular loss mentioned. The Circuit Court of Appeals held that the claim for refund, considered in the light of the appeal to the Commissioner and the petition for rehearing, was insufficient to "fairly advise the Government of the claim of the taxpayer for a refund" on the particular stock. In the complaint, plaintiff specifically set out his claim in respect to this particular stock, and alleged the filing of a claim for refund. The defendant admitted the filing of the claim, but did not make an issue of the sufficiency of the claim in respect to the particular stock. If he had done so, the plaintiff would have had time to amend the claim. When the point was raised at the trial, the period of limitation had expired. The Court, after referring to the statement of Justice HOLMES[11] that "men must turn square corners when they deal with the Government" said that the Government also "ought to turn square corners when dealing with its citizens". It also said (p. 581):

> "There is another maxim applicable in both of these appeals, and that is that substance should be given the right of way over form. (Citing cases.)

[11] *Rock Island R. R. Co.* v. *U. S.*, 254 U. S. 141.

> The claim for refund should have been more particular; but if the defendant expected to avoid the repayment of this illegally collected tax on that account, he should have been more particular in his answer. The derelictions of the parties are about equal, and if the matter is at large, the tax ought to be repaid, for concededly the government has no right to it."

In *Lehigh & Wilkes Barre Coal Co.* v. *United States,* 38 Fed. (2) 637 (D. C. M. D. Pa.), a defense was interposed in a suit to recover an overpayment of taxes that the claim for refund "did not specify the ground for the refund of taxes paid". Judge JOHNSON said that it was a sufficient answer to this position that it was impossible for the petitioner to specify the ground for refund because his return had not yet been audited when the claim was filed, or within the period of the statute of limitations. He further said (p. 639):

> "Furthermore, the Commissioner of Internal Revenue made no objection to the form of petitioner's claim filed February 10, 1925; *this the court considers important in this case.*
>
> Regardless of any defect of form or sufficiency in the original claim for refund the delay of the Commissioner of Internal Revenue to audit the petitioner's return within the period of the statute of limitations, and the impossibility on the part of the petitioner to file a more specific claim within the period of the statute of limitations, and the fact that no objection was made to the form of the petitioner's original claim for refund, *which amounts to a waiver of any irregularity,* and the subsequent amendment, specifying the grounds of petitioner's claim for a refund prior to the final rejection, made the claim effective (citing cases)."

Two decisions on this point were rendered by Judge HAZEL in the Western District of New York at about the same time (*Zeller* v. *United States,* 35 Fed. (2) 870, and *Art Metal Construction Company* v. *United States;* 35 Fed. (2) 379).

In the first of these suits, the claim for refund was for $1 or any sum which, by reason of "future court cases, treasury rulings or for other reasons, it may appear has been illegally or erroneously assessed or collected." And it was also stated in the claim that a claim for special assessment would be submitted later. In that case, as in the case at bar, the Government conceded that the tax was erroneous but resisted the suit upon the ground that the claim for refund was insufficient. In that case, as in this, the Commissioner, without objecting to the claim, had actually made a refund of part of the overpayment.

In the *Art Metal Construction Company* case, the claim for refund was apparently just as general as in the *Zeller* case. In this case, the plaintiff sought a refund to which it was admittedly entitled growing out of a decision of the Board of Tax Appeals in respect to special relief under the 1918 Act. The Commissioner declined to refund the amount to which the plaintiff was entitled under the special assessment decision because "the original claim for refund did not specifically ask for special assessment * * * the claim was barred by the statute of limitations." It was held, as it was in the *Zeller* case, that the Commissioner had waived the informality of the claim for refund. These cases recognized and applied the principle that the Commissioner may waive the requirements of the regulations that "all the facts relied upon in support of the claim should be clearly set forth under oath." It is true that in both of these cases, Judge HAZEL felt that the Commissioner had been fully

apprised *during the course of the proceedings before him* of the claim which the plaintiff was making and which was subsequently the subject matter of the suits.

As before stated, and as found by the Court of Claims, in the case at bar, it would have served no purpose to have apprised the Commissioner in the claim for refund of the specific facts upon which the present suit is based. Consequently, the situation in this case would seem to be no different than in the cases before Judge HAZEL. Moreover, it would seem to be immaterial whether the Commissioner is apprised, *during the course of the proceedings in his department*, of the ground upon which a suit is subsequently brought, if the ground is not set forth in the claim for refund. The regulations provide for the *filing* of a claim for refund which shall be specific as to the facts relied upon.

In *Taylor Lockwood Company* v. *United States* (Court of Claims, Dec. 8, 1930—Commerce Clearing House 1930 Service—Sec. 9737), the Court of Claims explained its decision in the case at bar, saying:

> "The language of the claim in that case was that 'This claim is filed to protect all possible legal rights of the taxpayer pending, and at the date of, the settlement of the claim for relief', and the court pointed out that 'by the use of such comprehensive terms it is, to say the least, perfectly apparent that the taxpayer notified the commissioner that all its legal rights would be insisted upon'. The commissioner received the refund claim, acted upon it as it was, granted a refund, without any complaint as to its generality in any respect at the hearing thereon, and no exceptions were taken as to its consideration at that time."

It is noteworthy of remark that in none of these cases, so far as the reports show, has an appeal been taken by the Government, although in each the ultimate decision was against it.

In *Arizona Commercial Mining Co.* v. *Casey,* 32 Fed. (2) 288 (which is briefly digested in petitioner's brief), the sole ground upon which the claim of waiver was predicated was that when the case was before an auditor, to whom it had been referred, the defendant stated in its brief that one of the issues of fact before the auditor was whether, and to what extent, the plaintiff was entitled to an additional deduction for depletion, this being the ground, asserted in the suit, which was not set forth in the claim for refund. One of the defendant's requests for findings filed with the auditor was that the "plaintiff produced no evidence that any claim for refund was filed with the Commissioner of Internal Revenue". Judge BREWSTER, speaking for the Court said (p. 291):

> "Inasmuch as the plaintiff claimed that it had duly filed with the collector of internal revenue at Boston a claim for a refund of the entire additional tax, it would be proper, if not necessary, for the auditor to make an alternative finding respecting the right of the plaintiff to a further deduction for depletion. To submit a brief on that issue was in no way inconsistent with the defendant's objection that the plaintiff had failed to comply with the statutory requirements. The facts disclosed on the record before me are clearly distinguishable from those confronting the court in *Tucker* v. *Alexander, supra.*"
>
> * * * * * * *
>
> "In the case at bar, the question of the sufficiency of the claim was raised in the pleadings and at the hearing before the auditor, and moreover the time

within which claims for refund could be filed had expired long before the defendant filed his brief with the auditor."

* * * * * * * *

"I find and rule on this aspect of the case that the defendant did not, by his course of conduct, waive compliance with the statute and regulations."

Consequently, this case cannot be considered as in any way opposed to the respondent's contention in the case at bar. There, the defendant at all times insisted upon the insufficiency of the claim for refund, admitting simply that the matter of depletion was an alternative issue before the auditor, in the event that the claim should be held to be sufficient.

CONCLUSION.

The respondent filed a claim for refund broad enough in terms and large enough in amount to include the specific claim now in suit, and thus complied with the statutory requirements. The Commissioner did not object to the generality of the claim but, on the contrary, acted upon and made a refund thereunder. If the claim had been specific as to the point now sued upon, it would have served no useful purpose, because it was the settled rule and policy of the Commissioner to refuse deductions for patent exhaustion when not claimed in the original return. The Commissioner has been in no way inconvenienced in preparing for trial, because the amount sued for is admittedly due if the claim for refund is sufficient.

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

Respectfully submitted,

THOMAS G. HAIGHT,
ROBERT H. MONTGOMERY,
J. MARVIN HAYNES,
Counsel for Respondent.